United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

Original

75-4132

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FOR THE SECOND CIRCUIT

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

ITT WORLD COMMUNICATIONS INC., THE WESTERN UNION TELEGRAPH COMPANY, and STATE OF HAWAII,
Intervenors.

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

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Preliminary Statement

Intervenor ITT World Communications Inc. ("ITT Worldcom") submits this brief in reply to the joint brief of the respondents, Federal Communications Commission ("FCC") and the United States, and in reply to the briefs of intervenors Western Union Telegraph Company ("WU") and the State of Hawaii.

Introduction

The question before the Court is whether the FCC erred when, in a Memorandum Opinion and Order (the Order) released June 23, 1975,[1] it held that WU was not barred by law from offering an international telegraph service known as Mailgram between Hawaii and the Continental United States.[2] ITT Worldcom and Petitioner Western Union International, Inc. ("WUI") contend that WU is prohibited from initiating international Mailgram service by Section 222 of the Communications Act, 47 U.S.C. §222.

Before addressing the specific arguments raised by WU, FCC, and Hawaii in their briefs, it is appropriate to put those arguments in perspective.

1. The issue before the Court and the FCC is not whether Mailgram service will be made available to the residents of Hawaii; the question is *which carriers* will provide that service. A number of carriers, including WUI and ITT Worldcom, have applications pending before the FCC for authority to offer services identical to Mailgram between the Continental U.S. and Hawaii.[3] Arrangements to provide interim Mailgram service to Hawaii during the pendency of these proceedings have been made by the FCC and the interested carriers.[4] The residents of Hawaii will therefore receive Mailgram service no matter how the Court

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[1] The Order is reproduced in the Appendix, pp. A7-A60. Subsequent references, *infra*, in the form "A" followed by a page reference are to the Appendix herein.

[2] Although Hawaii is a state, telegraph service between it and the Continental United States is, by statutory definition, international telegraph service. See ITT Worldcom's Initial Brief, p. 12, n. 30; 47 U.S.C. §222.

[3] ITT Worldcom Initial Brief, p. 11; Order, p. 7, A-20.

[4] FCC Brief, p. 13, n. 10.

decides the issues now before it. Moreover, the FCC has ample authority to assure Hawaii adequate service at reasonable rates regardless of which carriers are ultimately permitted to handle Mailgrams on a permanent basis.[5]

2. The issue before the Court is not whether WU should be prevented for all time from providing international telegraph service. The question is whether it is for Congress or the FCC to permit WU to resume international operations. Since Congress, in Section 222, directed WU to cease international telegraph operations, it is for Congress, and not the FCC or the courts, to lift or modify that decree. The attempts WU, Hawaii and the FCC make to show that Mailgram will not give WU an opportunity to abuse its domestic monopoly are thus made in the wrong forum. The efficacy of those arguments must be weighed by Congress if it is asked to amend Section 222; they cannot justify the FCC in ignoring Congress' mandate.

ARGUMENT

POINT I

Section 222 Prohibits WU's Proposed Resumption of International Telegraph Operations.

WU's Brief argues that Section 222 provides no restraint whatsoever on WU's reentry into international telegraph operations. WU asserts that since Section 222(c)(2) provides only for the divestiture of WU's international telegraph facilities, it does not prevent WU from reacquiring those facilities immediately after divestiture is completed or at any time thereafter. In WU's view, the Court should not examine the legislative history or purpose of Section

[5] See 47 U.S.C. §§201-205, 214(d).

222, but should interpret it literally, pursuant to the axiom of statutory construction that a statute should be interpreted in a manner which gives effect to the "plain language" of the statute and the "ordinary meaning" of language used.

WU's arguments fail for two reasons. Contrary to WU's assertions, the "plain meaning" of Section 222 requires WU to refrain from resuming international telegraph operations even after divestiture. In any event, WU has overstated the proper scope of the "plain meaning" rule, since that rule was never intended to prevent a court from considering legislative history and purpose as important guides to statutory construction.

A. *The "Plain Meaning" of the Divestiture Clause of Section 222 Prohibits WU's Reentry Into International Telegraph Operations*

WU's interpretation of Section 222 ignores the fact that divestiture clauses are familiar elements of antitrust decrees and have a well-understood significance to Congress, the courts and the bar. Divestiture is a device by which a structural change is made in an industry to remedy the anticompetitive or monopolistic tendencies of an unlawful acquisition or combination.[6] The effectiveness of a divestiture requirement would be completely destroyed if the party ordered to make divestiture could nullify the requirement by the simple expedient of transferring the assets in question to someone else, and later reacquiring them. Certainly, WU would be hard pressed to find a practicing antitrust lawyer who would advise a client which had completed a court-ordered divestiture that it could thereupon reacquire the same assets with impunity. Nor would WU find a court

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[6] *See, e.g., Ford Motor Co.* v. *U.S.*, 405 U.S. 562, 571-578 (1972), and the authorities cited therein.

which would not hold a party in contempt if it followed such ill-advised counsel. The common understanding of a divestiture order is that such an order not only requires the divestiture itself, but also prohibits the reacquisition of the assets divested. Rather than "succumbing to semantic aphasia",[7] the Court in construing the divestiture clause of Section 222 should give effect to "the normal meaning which lawyers and judges attribute to the term." [8]

There are few judicial decisions dealing with the precise question here at issue, *i.e.*, whether a clause in a statute or decree requiring divestiture is, without more, a continuing prohibition against subsequent reacquisition of the divested activity. The scarcity of authorities is no doubt attributable to the reluctance of antitrust defendants to urge a construction so clearly at odds with the purpose of a divestiture provision. There is, however, one decision which is directly in point, the opinion of Judge Palmieri in *U. S.* v. *Paramount Pictures, Inc.*, 165 F. Supp. 643 (S.D. N.Y. 1958), appeal dismissed, 358 U.S. 28 (1958).

In *Paramount Pictures,* Judge Palmieri was asked to decide whether the defendant could reacquire without the court's approval a theater of which it had previously divested itself pursuant to the court's decree, as a replacement for a neighboring theater which the defendant had been allowed to retain, but which had burned. In language peculiarly appropriate to this case, Judge Palmieri concluded that the divestiture clause of the judgment prohibited the proposed reacquisition:

> "I do not believe any useful purpose can be served by a detailed, word by word analysis of the provisions of the Judgment. The Judgment neither specifically per-

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[7] *American Telephone & Telegraph Co.* v. *F.C.C.*, 503 F.2d 612, 615 (2nd Cir. 1974).

[8] Id.

mits nor prohibits reacquisition of a divested theater to replace one which [defendant] retained under the Judgment. . . . But the limitation can be spelled out from the basic purpose of the divestiture provisions of the Judgment. That purpose permeates the entire fabric of the Judgment and is set forth in its preamble . . .

[The court then quoted from the text of the Judgment]

"The provisions of the Judgment above quoted are basic to the purposes and terms of the Judgment and particularly of its divestiture provisions. These must be read in light of the express intendment—that of creating competition or opportunities for competition with the defendant in the public interest . . . To recognize a unilateral, uncontrolled right of a defendant to undo what the Judgment clearly intended, would, under these circumstances, constitute a stultification of its express purposes. The effect of the exercise of such a right on the particular competitive situation in [the town where the theater was located] is, of course, irrelevant on this motion which calls for a construction of the Judgment's provisions which would be applicable regardless of what the competitive situation might be in [that town] or elsewhere. Whatever the private interest may be in reacquiring a previously divested theater without prior Court approval, it must give way to the overriding purpose of creating and promoting substantial independent competition for the defendants." 165 F. Supp. at 644-645.

In addition to Judge Palmieri's holding in *Paramount Pictures* that a divestiture clause must be construed to constitute a continuing barrier to reacquisition, there is a highly instructive decision of the Supreme Court construing the antitrust antonym of "divestiture," "acquisition". In *U.S.* v. *ITT Continental Baking Co.*,[9] the Supreme Court

[9] 420 U.S. 223 (1975).

rejected the arbitrary, mechanical approach to the construction of antitrust decrees which WU urges here, and held that the provisions of an F.T.C. decree which prohibited Continental from "acquiring" the assets of other bakeries must be construed to prohibit not only the initial act of acquiring, but also the continued retention of the assets acquired in contravention of the decree.

The question before the Court in *ITT Continental Baking* was whether a consent decree, which by its terms prohibited no more than the act of "acquiring", should be construed to prohibit not just the acquisition, but also the continued retention of the prohibited assets, so that each day the assets were held would constitute a "continuing violation" of the decree subjecting Continental to daily penalties under the Clayton and Federal Trade Commission Acts.

Continental argued that since the literal language of the decree referred merely to acquiring assets, the decree should be construed to prohibit only the act of acquisition itself, making Continental liable, at most, for a single penalty.[10] The Court rejected this interpretation, and concluded that the use of the word "acquiring" could only be interpreted to mean that Continental was prohibited both from acquiring and from retaining the assets in question:

> "Even without the aid of [certain] explanatory documents properly usable to construe this particular order, we would have to conclude that 'acquiring' as used in an antitrust decree or order continues until the assets obtained are disgorged. As the foregoing

[10] The standard by which consent decrees must be construed is essentially identical to the "plain meaning" rule urged by WU here. See *U.S.* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971).

> analysis of the ancillary documents here illustrates, 'acquiring' and related words do not, as respondent insists, unambiguously refer to a single transaction. Rather, as a matter of ordinary usage they can, and in the antitrust context they do, encompass the continuing act of obtaining certain rights and treating them as one's own. We must assume that the parties here used the words with the specialized meaning they have in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint." 420 U.S. at 240.

Thus, the Supreme Court in *ITT Continental Baking* recognized that the antitrust laws are concerned not simply with the purchase or sale of particular assets, but with the continuing ownership status of those assets, with the purpose of preserving a competitive structure in the industry in question.[11] The method of analysis the Court applied in *ITT Continental Baking* is fully applicable to the interpretation of a divestiture clause, which is the antitrust mirror-image of the acquisition clause at issue there. If, as WU suggests, the effects of a divestiture clause could be evaded merely by divesting the assets in question and thereafter reacquiring them, the divestiture clause would become a

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[11] The Court relied upon two decisions of this Court:

> "Some lower federal courts have also recognized that the status approach to acquisition is the proper one. See *Gottesman* v. *General Motors Corp.*, 414 F.2d 956, 965 (CA2 1969): '[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 [in *Du Pont*] continued through 1961 . . . [W]hat was unlawful was Du Pont's status as stockholder in General Motors, and that status continued until divestiture.' (Emphasis supplied.) See also *United States* v. *Schine*, 260 F.2d 552, 555-556 (CA2 1958): '[I]t is the maintenance of conditions in violation of the decree [prohibiting acquisitions, among other things] which is the charge against the respondents.' Therefore, the court in *Schine* concluded, it was irrelevant that the initial transactions occurred prior to the statutory limitations period." 420 U.S. at 243, n. 14. See also *U.S.* v. *Du Pont*, 353 U.S. 586 (1957), cited in *ITT Continental Baking*, 420 U.S. at 241.

nullity.[12] Common sense dictates that a divestiture clause need be read as preventing the reacquisition of the divested assets, and that is the teaching of both *Paramount Pictures* and *ITT Continental Baking, supra.*

Not surprisingly, WU has been unable to cite in its Brief any decision which interpreted a divestiture order as permitting the subsequent reacquisition of the divested assets. Instead, WU merely cites three cases[13] in which explicit bans on future acquisitions (which, in addition to prohibiting reacquisition of the divested assets would have prohibited the purchase of assets not involved in the original lawsuit) were, or were not, included in the final decree. The most recent of the three, *Maryland & Virginia Milk Producers Assn.* v. *U. S.,* actually supports ITT Worldcom's interpretation of the divestiture clause, since the Dis-

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[12] WU suggests that Section 222 should not be interpreted as a continuing bar to its resumption of international telegraph operations after divestiture because any application it made to resume such operations would be subject to FCC approval pursuant to Section 214 of the Communications Act, and the FCC would presumably prevent WU's reentry into the international area if it would create anticompetitive results inimical to the public interest. Such a construction makes Section 222 lead to a nonsensical result which the Court should avoid. *Cf. F.M.C.* v. *Caragher,* 364 F.2d 709, 715 (2nd Cir. 1966). If Congress really intended to give the FCC plenary authority to undue the result of WU's divestiture, it would have been ridiculous to have included an unqualified divestment requirement in Section 222. Rather than require WU to go to the effort and expense of divesting its international operations, only to then reacquire some or all of them subject to the FCC's approval, the obvious and rational statutory approach would have been to leave the entire divestiture question to the FCC by granting the FCC authority to require WU to dispose of those international facilities which the FCC deemed it should not continue to hold after the WU-Postal merger. As the legislative history clearly demonstrates, Congress considered, but rejected this approach. See ITT Worldcom's Initial Brief, pp. 19-20.

[13] *Maryland & Virginia Milk Producers Assn.* v. *U.S.,* 362 U.S. 458 (1960); *Schine Chain Theaters, Inc.* v. *U.S.,* 334 U.S. 110 (1948); *U.S.* v. *Crescent Amusement Co.,* 323 U.S. 173 (1944).

trict Court justified its decision against including an explicit prohibition of future acquisitions in its divestiture decree on the grounds, *inter alia,* that the government would be adequately protected by the requirement that the defendant exercise "good faith" in complying with the divestiture decree and by subsequent orders of the court, if necessary.[14] Such a holding clearly contemplates that the divestiture decree, even without an explicit ban against future acquisitions, would have a continuing effectiveness after divestiture to prevent reacquisitions.

The other two cases cited by WU[15] both involved a ban on certain future acquisitions in the final decree. In neither case did the court even intimate that a clause prohibiting acquisitions was necessary to prevent a reacquisition of divested assets. In one of these cases, *Crescent Amusement,* the assets involved in the divestiture provisions of the decrees were not the same as those involved in the provision banning future acquisitions, so that the case has no bearing whatsoever on the issue of whether a divestiture clause in and of itself prohibits future reacquisition of the assets divested.[16] Even if the same assets had been

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[14] 362 U.S. at 472-73.

[15] *Schine Theaters, Crescent Amusement, supra.*

[16] Neither *Crescent Amusement* or *Schine* dealt with the situation in which divestiture decrees are typically entered, *i.e.,* an anticompetitive acquisition of one company by another. Instead, *Schine* and *Crescent* were two of a number of suits the Government brought during the 1930's and 1940's to attack the distribution practices of the motion picture industry. See also, *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *U.S. Griffith,* 334 U.S. 100 (1948); *U.S.* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948). The anticompetitive activity at issue in both *Schine* and *Crescent* was a practice known as "block booking" or "circuit booking," through which the purchasing power of several affiliated chains of theaters was combined and used to compete unfairly with independent theaters. In essence, the chains required a movie studio, as a condition to exhibiting that studio's films in towns where

involved, the provisions banning future acquisitions would have shed little light on the question of construction presently before the Court, since those clauses might have been included merely to make explicit, for the sake of clarity and certainty, what would have been implicit in the decree even if they had been omitted. In all events, these cases certainly do not stand for the proposition that a decree must specifically prohibit reacquisition of divested assets before a divestiture clause can be given that effect.

B. *WU's Brief Misstates the Proper Scope of the "Plain Meaning" Approach to Statutory Construction*

Assuming for the moment that the words of Section 222 could support the interpretation WU gives them—which they do not—the approach to statutory construction WU urges is erroneous. For whatever continuing vitality the

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the chains owned all the theaters, to give the chains preferential treatment over their rivals in other towns where they had competitors. One manifestation of the anticompetitive effect of these practices was the purchase of independent theaters by the chains, as the independents were driven out of the business.

The decrees in *Schine* and *Crescent* both enjoined the defendants from acquiring any interests in additional theaters except on an affirmative showing that competition would not be restrained. Presumably, this clause of the decree was intended to prevent the chains from entering into new towns where they might, through repetition of their past abuses, drive the existing independents under. However, the prohibition on future theater acquisitions was not the principal vehicle for remedying the evil at hand. Indeed, the defendants in *Crescent* were not even required to divest themselves of any of their existing theaters, so the future acquisition clause cannot be interpreted as dealing with the reacquisition question by any stretch of the imagination. In both *Schine* and *Crescent* the principal thrust of the decree was to break-up the interrelationship of the chains and end their block booking practices. One approach the court used was to require certain divestitures of *stock* to prevent common ownership of two or more chains. Significantly, these divestiture decrees did not include any specific prohibition of reacquisition of the stock (as distinguished from theaters).

"plain meaning" rule of statutory construction may have,[17] it is clear that the rule was always intended to be used intelligently rather than in the arbitrary and mechanical manner WU suggests. As this Court has recognized in rejecting an earlier invitation to misapply the "plain meaning" rule:

> "[N]ot only are we not required, we are not permitted to interpret statutes in the mechanical fashion for which appellants contend." *U.S.* v. *National Marine Engineers' Beneficial Association,* 294 F.2d 385, 390-91 (2nd Cir. 1961).[18]

The reason why the "plain meaning" rule must be applied with intelligence and caution has been succinctly stated by the Supreme Court:

> "The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.'" *Lynch* v. *Overholser,* 369 U.S. 705, 710 (1962) (citations omitted).

The "plain meaning" rule does not, as WU asserts, require the Court to interpret a statute in the abstract, with-

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[17] WU cites four cases as its authority for the "plain meaning" rule. WU Brief, p. 13. The most recent of these, *U.S.* v. *Great Northern Railway Co.,* 343 U.S. 562 (1952) was decided twenty-five years ago. This Court has recently questioned the continuing authority of another of the opinions on which WU relies, *Caminetti* v. *U.S.,* 242 U.S. 470 (1917). The Court observed that "the days when the 'plain meaning' rule of *Caminetti* v. *U. S.* . . . was a *vade mecum* for the interpretation of criminal statutes have long since passed." *U.S.* v. *Rivera,* 513 F.2d 519, 532 (2nd Cir. 1975). Compare, however, Judge Mansfield's dissent in *U.S.* v. *Reid,* 517 F.2d 953 (2nd Cir. 1975).

[18] Judge Friendly's opinion in *National Marine Engineers' Beneficial Association* relies on a long line of Supreme Court decisions beginning with *Church of the Holy Trinity* v. *U.S.,* 143 U.S. 457 (1892).

out any reference to legislative history or statutory purpose. Rather, it is only after the Court has ascertained the purpose underlying the statute that it can rationally decide whether, in the context of the purpose sought to be achieved, the words are unambiguous enough to be given their literal meaning. The proper interrelationship between the "plain meaning" rule and the necessity of interpreting a statute in consonance with its purpose has been clearly stated by the Supreme Court:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *U.S.* v. *American Trucking Associations,* 310 U.S. 534, 543 (1940) (footnotes omitted).

The next sentence of the *American Trucking* decision explicitly refutes WU's suggestion[19] that the Court should not consider WUI's and ITT Worldcom's discussions of the historical background and legislative history of Section 222 as guides to the proper interpretation of that Section:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination." [20]

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[19] WU Brief, pp. 23-27.

[20] 310 U.S. at 543-44 (footnotes omitted).

WU is understandably reluctant to have the Court interpret Section 222 in light of its purpose. For, as the FCC recognized in its Order, the purpose of Section 222 was to preserve the ongoing competitive viability of the international record carriers ("IRCs") despite WU's monopolization of the domestic facilities necessary for originating and delivering international telegraph traffic. Given this purpose, the construction urged by WU would make the divestment provision of Section 222 "absurd and meaningless," [21] as the FCC properly held in its Order, which rejected the interpretation of Section 222 WU urges here:

> "We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS operations in competition with the IRC's." Appendix to Order, p. 9; A45-A46.

Thus, even assuming *arguendo* the divestiture clause of Section 222 had the "plain meaning" which WU contends it has, this Court would be obliged to construe it, if possible, as a permanent ban on WU's overseas operations, in order to prevent an "absurd" result and effectuate the fundamental purposes of the Section.[22]

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[21] *American Trucking Associations, supra,* 310 U.S. at 543.

[22] As the Court held in *Haberman* v. *Finch,* 418 F.2d 664, 666 (2nd Cir. 1969):

> "It is a familiar maxim of statutory interpretation that courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words leave room for a contrary interpretation."

See, also, the opinions of this Court cited at pp. 30-31, n. 51 of ITT Worldcom's Initial Brief, and the authorities cited above.

And, see, National Woodwork Manufacturers Association v. *N.L.R.B.,* 386 U.S. 612, 619 (1967); *Ozawa* v. *U.S.,* 260 U.S. 178

This is not, however, a case in which the Court must decide the proper application and limits of the "plain meaning" rule. For, as discussed above, the "plain meaning" WU attributes to the divestiture clause of Section 222 is strained and artificial, and wholly at odds with the natural import of the words used. As WUI and ITT Worldcom have demonstrated, the true "plain meaning" of Section 222 both requires WU to divest itself of its international facilities and prevents WU from undoing that divestiture by resuming any international telegraph operations. Since this "plain meaning" of the statute is fully consistent with the statutory purpose, the Court need not hesitate to follow Section 222 as written and bar WU from reentering the international arena.

POINT II

The Statutory Construction of Section 222 Urged by the FCC and the State of Hawaii Is, Like the Construction Urged by WU, Inconsistent With Both the Language and the Purpose of Section 222.

The FCC and Hawaii construe Section 222 somewhat differently than WU. They rest their arguments on the theory that Mailgram is an international telegraph service somehow new and different from public message service ("PMS"), the traditional form of telegraph service. Pointing to the language of Section 222(c)(2) which requires WU to divest itself of the international telegraph operations which were "theretofore carried on" by either party

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(1922); *Bongiovanni* v. *C.I.R.*, 470 F.2d 921, 924 (2nd Cir. 1972); *F.M.C.* v. *Caragher*, 364 F.2d 709, 714-15 (2nd Cir. 1966); *Quinn* v. *Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975); *Cleary* v. *Chalk*, 488 F.2d 1315, 1322 (D.C. Cir. 1973), *cert. den.* 416 U.S. 938 (1974).

to the merger, they argue that the continuing prohibition of WU's international activity applies only to forms of telegraph service which were offered by WU when Section 222 was enacted in 1943, and does not prevent WU from providing "new" international services not then offered.

The FCC and Hawaii thus support the construction of Section 222 which was adopted by the FCC in its Order,[23] and was shown to be untenable in the initial briefs of WUI and ITT Worldcom.

The Court need not now consider what applicability, if any, Section 222 would have to a truly new and innovative telegraph service which did not present WU with an oppor-

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[23] The FCC and WU, in their briefs, appeal to the adage that an administrative agency's construction of its governing statute should be given consideration by the courts. However, as WUI correctly pointed out in its initial brief, the ultimate responsibility for statutory construction remains with the Court. WUI Brief, p. 11, n. The Supreme Court has delineated the limits of the rule that an agency's statutory construction should be considered:

> "[T]he courts are the final authorities on issues of statutory construction, *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . .' *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 318." *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261, 272 (1968).

Similarly, this Court has stated:

> "While the construction of a statute by the agency charged with administering it is entitled to be given weight, 'in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means." *Wisdom* v. *Norton*, 507 F.2d 750, 756 (2nd Cir. 1974), quoting from *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2nd Cir. 1946) (L. Hand, J.), *aff'd* 328 U.S. 275 (1946)."

tunity to abuse its domestic telegraph monopoly.[24] For, as ITT Worldcom demonstrated in its Initial Brief,[25] international Mailgram service is not new or different from traditional telegraph service for the purposes of Section 222.

The answering briefs' efforts to show that Mailgrams are somehow new or different from traditional telegrams rely

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[24] In their initial briefs, ITT Worldcom and WUI discussed both the legislative history of Section 222 and the decisions and other authorities construing that Section after enactment. Those discussions need not be repeated here, but it should be pointed out that none of the numerous authorities cited raised any suggestion that Section 222 distinguished between "old" and "new" international telegraphic services.

What should be clear from the legislative history is that the relative clause, "theretofore carried on by any party to the . . . merger" in Section 222 was never intended by Congress to be a "defining" clause but is simply elaborative or explanatory of the phrase "international telegraph operations" to which the relative clause refers. See, Fowler, *Dictionary of Modern English Usage*, 625-26 (2nd Edition, 1965). Thus, the FCC's Order and the attempts to justify it in this Court are founded on an elementary error as simple as that involved in the not uncommon misuse of "that" for "which". See, Fowler, *loc. cit.* Section 222, in other words, directs WU to cease the international telegraph operations *which* it was then carrying on without any intention of distinguishing between "old" and "new" services.

It should be noted, in passing, that the FCC's Brief, p. 20, n. 11, misstates this Court's holding in *Western Union Telegraph Co.* v. *U.S.*, 267 F.2d 715 (2nd Cir. 1959). In that case, the Court clearly recognized that it was the congressional desire:

> "to divorce completely Western Union's virtual land-line monopoly, following the merger, from all financial interest in international telegraph operations." 267 F.2d at 723.

The passage from that opinion quoted by the FCC, to the effect that Congress never contemplated "perfect divorcement", was simply intended to indicate that the divestiture of WU's international facilities which Section 222 mandated should not be delayed merely because WU would remain contingently liable after the divestiture under the terms of the leases on certain trans-Atlantic cables; the Court did not intimate any belief that WU would not be completely barred from all international telegraph operations after the divestiture.

[25] Pp. 30-33.

solely on the fact that Mailgrams are delivered by the U.S. Post Office rather than a WU messenger. However, except in Hawaii and a few other overseas locations, delivery of international telegrams in overseas areas is not the responsibility of the U. S. international carrier. Instead, the IRC typically transmits international telegrams to its overseas correspondent[26] for delivery to the addressee. Thus, by arguing that it has a new partner in its "new" international telegraph service to Hawaii and that this new partner—the Post Office—carries out its portion of the communication service, namely delivery, in a manner different from that which WU has traditionally employed, WU has in no way demonstrated that the operations in which it will be engaged in connection with international Mailgram service are any different from the traditional role of an international carrier in international telegraph operations.

Moreover, in focusing on the delivery rather than the pick-up and intermediate handling of international Mailgram traffic, the answering briefs fail to distinguish Mailgram from traditional international telegrams in any respect which is relevant to the purposes of Section 222. The purpose of that Section was to prevent WU from abusing its near-monopoly control over the origination of international telegrams to allocate outgoing traffic unfairly in favor of its own facilities. Thus, distinctions in the method of delivery, on which the FCC, WU, and Hawaii all rely, cannot be used to distinguish between Mailgrams and telegrams. By the time a Mailgram arrives on the teleprinter in the Post Office in Hawaii and is turned over to the Postal Service for delivery, its routing will have already been determined by WU, and WU's opportunity to favor its own facilities will have been exercised.

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[26] E.g., the British Post Office or the German *Bundespost*.

It is undisputed that international Mailgrams will be originated on WU's domestic network in essentially the same way as traditional telegrams. Despite the fact that delivery will ultimately be made by the Post Office, WU will continue to perform all the functions relating to pick-up, routing, and transmittal which would permit it to profit unfairly from its domestic monopoly.[27] Thus, even assuming that Section 222 distinguishes between "old" and "new" international telegraph services, which it does not, Mailgram cannot be construed as a "new" service for the purposes of that Section without ignoring or evading the statutory purposes. The FCC's construction of Section 222 must therefore be rejected.[28]

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[27] This ability of WU to abuse its monopoly position and arbitrarily allocate international Mailgram traffic to its own international Mailgram facilities is, of course, the key reason for the IRCs' opposition to permitting WU to offer Mailgram in competition with the IRCs. The FCC's Brief, at p. 26, completely misses the point when it suggests that the IRCs are afraid that WU's international Mailgram will attract customers from traditional international PMS. The immediate concern is not that WU's Mailgram service will compete unfairly with IRCs' PMS service, but that WU will abuse its monopoly position to unfairly divert traffic from the IRCs' *Mailgram*-type service, which the IRCs all propose to offer.

Nor can the IRCs' position be fairly characterized as an attempt to prevent competition generally in the offering of international record services. This area is one of the few places in the communications industry where competition has survived, providing the public with the innovative and efficient service competition typically insures. ITT Worldcom fully supports the continued existence of competition in the market for international record communications. It is precisely because it wishes to preserve this competitive environment that it opposes the reentry of a monopolist like WU into international telegraph operations, since such a monopolist can be expected to use the power of its domestic monopoly to destroy competition and monopolize the international markets where it is allowed to enter.

[28] *American Trucking Association*, and the other authorities cited *supra*, p. 14, n. 22.

A. *The Answering Briefs Seek to Introduce Irrelevant Considerations Relating to Competitive Conditions in the Telegraph Industry as a Whole*

The answering briefs discuss in some detail a number of changes in the telegraph industry which they allege have occurred since Section 222 was enacted,[29] and assert that these changes enable the IRCs to compete with WU in picking up international telegraph traffic.

The factors the answering briefs raise might have some relevance if they were asserted in an appeal to Congress to amend the ban Section 222 places on WU's international activities. However, they are not appropriately raised in this Court because they are considerations which pertain to the structure of the entire international telegraph industry and are equally applicable to both Mailgrams and traditional telegraph service. Thus, they have no relevance to the question on which the FCC's construction of Section 222 turns, *i.e.*, whether Mailgram is a "new" service distinguishable from traditional international telegraph service. In any event, the competitive changes on which the opposing briefs rely have not appreciably diminished WU's control over the origination of outgoing international telegraph traffic.

1. *"Competition" between WU and the IRCs in the Gateway Cities.*

WU suggests that because the IRCs maintain public telegraph offices in the handful of gateway cities in which they are authorized to operate, WU's potential for abusing its domestic monopoly is reduced.

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[29] Specifically, the answering briefs point to three factors: (1) the purported ability of the IRCs to "compete" with WU to pick-up outgoing telegrams in the gateway cities, (2) the availability of so called "paid direct access" to international telegraph users, and (3) the origination of a fraction of Mailgrams over customer-operated telex, TWX, or Infocom, without personal contact with WU employees.

Since the enactment of Section 222, the IRCs have operated domestically in a limited number of so-called "gateway" cities, which essentially serve as domestic terminals of the communications channels linking the U.S. with international points. No IRC can expand into additional gateways without FCC approval. While the IRCs' offices in the gateways give them an opportunity to compete with WU for telegraph pick-ups from the fraction of potential customers who reside in those particular cities, the presence of IRC telegraph offices in the gateway cities in no way diminishes the extent to which the IRCs are dependent upon WU's domestic facilities to serve the large numbers of potential customers who are found in the "hinterland" beyond the gateways.[30]

The IRCs' gateway offices are no more or less suited for accepting Mailgrams than for accepting the traditional international telegrams now being filed there, so the existence of these gateway facilities cannot be used to support the Order's policy of distinguishing between "old" and "new" international telegraph services.

2. *"Paid Direct Access."*

Paid direct access, as indicated in ITT Worldcom's Initial Brief,[31] allows a hinterland customer to transmit an international telegram directly to the IRC's gateway facilities by telephone or telex, rather than using one of WU's public telegraph offices. Neither WU or FCC makes sufficiently explicit a significant feature of paid direct access which is particularly pertinent to the issues in question here. When a customer avails himself of paid direct access, he must not only pay the full cost of transmitting the tele-

[30] Even if the IRCs win FCC approval to increase the number of gateways (see WU's Brief at p. 22), most of the country will remain part of the hinterland.

[31] P. 5, n. 12.

gram to the gateway by telex or long distance telephone, he must also pay the full international telegraph toll, as if he had sent the telegram through the local WU telegraph office. Thus, the customer pays a substantial premium for using paid direct access, and the existence of this alternative means through which a hinterland customer may file his international telegraph messages does not lessen the IRCs' dependence on WU with respect to the large number of hinterland customers who refuse to pay the premium required for using it.

Again, paid direct access may be used to transmit either a telegram or a Mailgram to the IRCs, and therefore cannot support a distinction between "old" and "new" telegraph services.

3. *The Use of Telex to Originate Telegrams*

WU argues that because a fraction of Mailgram traffic is originated over customer-operated telex, its opportunity to misuse its domestic monopoly is reduced. However, the domestic telex network is a part of the WU monopoly.[32] Thus, WU is in as good a position to limit the IRCs' ability to compete for the patronage of customers who file Mailgrams by telex as it is with respect to the patronage of customers who initiate international traffic in WU offices.[33] Moreover, it is obvious that large numbers of Mailgram customers will not have one of WU's telex machines installed in their homes or offices, and as to them, this factor is irrelevant.

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[32] See ITT Worldcom's Initial Brief, p. 3; *The Western Union Telegraph Co.*, 24 F.C.C. 2d 664 (1970).

[33] While WU argues that it does not have the personal contact with the telex customer at the moment of overseas transmission, it neglects to point out that its personnel have continuing contact with telex customers in connection with the installation and servicing of WU telex machines in the customers' premises.

Since a customer may use his telex machine equally efficiently to file either a telegram or a Mailgram, this factor, like the two discussed previously, cannot be used to distinguish international Mailgrams from traditional telegraph service, which the FCC concedes WU cannot offer internationally.

B. *The FCC Cannot Effectively Prevent WU From Abusing Its Domestic Monopoly; Even If It Could Do So, It Would Not Be Justified in Misconstruing Section 222*

The briefs of WU and the FCC both assert that the FCC has sufficient authority under the Communications Act to prevent WU from abusing its domestic monopoly if it is allowed to compete with the IRCs in offering international Mailgram service. From this, they would conclude that Section 222 should not be interpreted as preventing WU from resuming international operations.[34]

However, as this Court has held, the fact that the FCC possesses extensive general powers to regulate the communications industry cannot be a justification for ignoring the statutory plan Congress has provided.[35] In enacting Section 222, Congress chose to foreclose WU from reentering the international market rather than relying on the FCC to regulate WU's international activity, and that Congressional decision must be given effect.

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[34] Hawaii's Brief does not make this argument, but asserts instead that the IRCs will be protected from misuse of WU's monopoly by the vigilance of the U.S. Postal Service, a point also endorsed by WU. The argument does not require extensive comment. The Postal Service will serve merely as the delivery agent for WU's Mailgram service. It has no practical way of monitoring or controlling the way in which WU allocates international traffic and lacks the statutory authority and, undoubtedly, the inclination to do so.

[35] *American Telephone & Telegraph Co.* v. *F.C.C.*, 487 F.2d 865, 872-876 (2nd Cir. 1973).

Moreover, the historical record has proven the wisdom of the course chosen by Congress. In its Initial Brief, ITT Worldcom discussed the FCC's decision in *Western Union Telegraph Co.*,[36] which firmly establishes the FCC's inability to prevent WU from misusing its monopoly position, as illustrated by its unsuccessful efforts during the period between the WU-Postal merger and the divestiture of WU's international operations. Should the Court have any doubts that the FCC still lacks the ability to force a carrier which enjoys a monopoly in one area to compete fairly in a related area where it has competitors, it need only consult the D.C. Circuit's recent decision in *Nader* v. *F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975). There, the court *sua sponte* excoriated the FCC for the inadequacy of its regulation of AT&T's monopoly of domestic telephone service.[37] Among other things, the *Nader* opinion points out that despite a ten-year old investigation into AT&T's rates and practices, the FCC has not yet been able to determine whether AT&T cross-subsidizes activities in which it has competitors with profits earned from areas in which it enjoys a monopoly.

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[36] 25 F.C.C. 35 (1958), rev'd on other grds., 267 F.2d 715 (2nd Cir. 1959).

[37] 520 F.2d at 205-207.

CONCLUSION

In summary, whether the Court looks merely to the words of Section 222 or the words together with the legislative history and purpose of that Section, the statute clearly prohibits WU from engaging in the international telegraph operations in which it now seeks to engage.[38] For the reasons stated above and in the opening briefs of ITT Worldcom and WUI, ITT Worldcom respectfully requests that this Court reverse in all respects the Memorandum Opinion and Order released by the Federal Communications Commission on June 23, 1975.

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[38] Before closing, one final issue should be discussed. WU suggested that the antitrust issue raised by ITT Worldcom in its Initial Brief should not be considered by the Court. The antitrust issue was raised before the FCC by WUI (A203-A204). Since it was presented to the FCC below, it may be urged by any party here; ITT Worldcom need not have been the party to raise it below. *See Office of Communications of United Church of Christ* v. *F.C.C.*, 465 F.2d 519, 523 (D.C. Cir. 1972); *Wilson & Co.* v. *U.S.*, 335 F.2d 788 (7th Cir. 1964), rem'd 382 U.S. 454 (1966). The merits of the antitrust issue were fully discussed in ITT Worldcom's Initial Brief, and need not be reargued.